Supreme Court, U. S.
FILED
JUL 5 1977
MICHAEL RODAK, JR., CLERK

In The Supreme Court Of The United States

October Term, 1976

No. 76-1717

CHICKASHA COTTON OIL COMPANY, a corporation, ET AL.,
Petitioners,

VERSUS

THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA and THE PUBLIC SERVICE COMPANY OF OKLAHOMA, a corporation,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE OKLAHOMA SUPREME COURT

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July, 1977

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In The Supreme Court Of The United States

October Term, 1976

No. 76-1717

CHICKASHA COTTON OIL COMPANY, a corporation; FARMERS UNION COOPERATIVE GIN AT MARTHA; HARMON COUNTY COOPERATIVE ASSOCIATION; FARMERS UNION COOPERATIVE GIN AT DILL CITY; FARMERS UNION COOPERATIVE GIN AT SENTINEL; PLANTERS COOPERATIVE ASSOCIATION; FARMERS UNION COOPERATIVE GIN AT ELK CITY; FLEET-TERRAL GIN COMPANY; COTTON FARMERS COOPERATIVE GIN; FARMERS COOPERATIVE GIN AND LUMBER; LINCOLN PROPERTY CO.; RODEWAY INNS, INC.; and G.E.M. 15, INC.; J. H. FRATES and JOHANNA I. FRATES, TRUSTEES; THE LEWISTON LTD., a limited partnership, and FRATES PROPERTIES, INC.; CRYSTAL BOWL, INC.; a corporation; HARVARD LANES, INC., a corporation; ROSE BOWL LANES, INC., a corporation; SAHOMA BOWLING LANES, INC., a corporation; SHERIDAN LANES, INC., a corporation; TIFFANY BOWL, INC., a corporation; YALE BOWL, INC., a corporation; and all other members of the Oklahoma Bowling Proprietors Association served by Public Service Company of Oklahoma, a corporation,

Petitioners,

VERSUS

THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA and THE PUBLIC SERVICE COMPANY OF OKLAHOMA, a corporation,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE OKLAHOMA SUPREME COURT

Respondent Oklahoma Corporation Commission (the "Commission"), submits this brief in opposition to the Petition of Chickasha Cotton Oil Company, et al., for a Writ of Certiorari to review the judgment of the Oklahoma Supreme Court.

I.
OPINIONS BELOW

Petitioners have correctly stated the "Opinions Below" in the Petition.

II.
JURISDICTION

The Respondent denies that this is a proper case for issuance of a Writ of Certiorari but does not deny jurisdiction to consider the Petition.

III.
QUESTIONS PRESENTED FOR REVIEW

1. Does Oklahoma law regarding notice for public rate making hearings contravene the Fourteenth Amendment to the U.S. Constitution?

2. Should a Writ of Certiorari issue when Petitioners have adequate administrative remedies which have not been exhausted?

IV.
CONSTITUTIONAL PROVISIONS, STATUTES, RULES AND REGULATIONS INVOLVED

Petitioners have conspicuously omitted the following statutes and rules which are involved herein and are set forth verbatim in the Appendix as follows:

Okla. Corp. Comm. R. of Practice 25(b) (Appendix B-1)
Okla. Corp. Comm. R. of Practice 25(c) (Appendix B-2)
Okla. Corp. Comm. R. of Practice 26(b) (Appendix B-2)
Title 17, O.S. Sec. 121 (Appendix A-1)
Title 17, O.S. Sec. 122 (Appendix A-1)
Title 17, O.S. Sec. 124 (Appendix A-2)
Title 17, O.S. Sec. 152 (Appendix A-2)

V.
STATEMENT OF THE CASE

The Statement of the Case set forth by the Respondent

Public Service Company of Oklahoma is adopted by Respondent Oklahoma Corporation Commission.

VI.
CONCISE ARGUMENT

A. The Oklahoma Statutes and Corporation Commission Rules are not Repugnant to the Due Process Clause of the Fourteenth Amendment.

It has been held repeatedly that a rate making hearing is essentially legislative in nature and that "Due Process" notice is not required: *Public Utilities Commission of California v. United States*, 356 F.2d 236, 241 (9th Cir. 1966), *cert. denied*, 385 U.S. 816; *Lenihan v. Tri-State Telephone & Telegraph Co.*, 208 Minn. 172, 293 N.W. 601, 605 (1940), *cert. denied*, 311 U.S. 711; and *Teleco, Inc. v. Southwestern Bell Tel. Co.*, 392 F.Supp. 692 (W.D. Okla. 1974), *aff'd*, 511 F.2d 949 (10th Cir. 1975), *cert. denied*, 423 U.S. 875. In the *Teleco* case, the District Court Judge held:

> *"Plaintiff's claim of lack of due process of law by not receiving notice of and an opportunity to be heard before Defendant's tariffs filed with the Oklahoma Corporation Commission became effective is without merit. The tariff procedure utilized under law by state agencies supervising companies which provide public service to the people has been described and characterized as being legislative in nature. And being legislative in nature a due process hearing is not necessary before the tariffs become effective.* Washington Gas Light Co. v. Virginia Electric and Power Co., 438 F.2d 248 (Fourth Cir. 1971); Lewis v. Potomac Electric Power Co., 62 App. D.C. 63, 64 F.2d 701 (1933). *This position of Plaintiff is without merit."* (Emphasis added) 392 F.Supp. at 698

It has also been repeatedly held that ratepayers do not have a constitutionally protected interest in any particular level of utility rates. Petitioners apparently contend for a new property right in the utility rates that they enjoyed prior to the entry of the order of the Commission. This "property right" has been denied in a host of cases heard by this Court.[1] Petitioners have cited no case and Respondent has found none establishing a constitutionally protected property right in an existing utility rate. No procedural due process question can exist without the requisite property right. As the United States Supreme Court stated in *Board of Regents v. Roth*, 408 U.S. 564 (1972):

> "The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount.

[1] *Wright v. Central Kentucky Natural Gas Co.*, 297 U.S. 537 (1936); *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294 (1933); *Public Utilities Commission of California v. United States*, 356 F.2d 236 (9th Cir. 1966), *cert. denied*, 385 U.S. 816; *San Antonio Utilities League v. Southwestern Bell Telephone Co.*, 86 F.2d 584 (5th Cir. 1936), *cert. denied*, 301 U.S. 682 (1937); *United States Light & Heat Corp. v. Niagara Falls Gas & Electric Light Co.*, 47 F.2d 567 (2nd Cir. 1931), *cert. denied*, 283 U.S. 864; *Sellers v. Iowa Power and Light Co.*, 372 F.Supp. 1169 (S.D. Iowa 1974); *Teleco, Inc. v. Southwestern Bell Telephone Co.*, 392 F.Supp. 692 (W.D. Okla. 1974), aff'd, 511 F.2d 949 (10th Cir. 1975), *cert. denied*, 423 U.S. 875.

But the range of interests protected by procedural due process is not infinite.

* * *

And a weighing process has long been a part of any determination of the *form* of hearing required in particular situations by procedural due process. But, to determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the *nature* of the interest at stake." (Emphasis in original.) 408 U.S. at 569-71.

The Oklahoma Constitution, Statutes and Commission Rules provide for extensive notice. The required notice was admittedly given and Petitioners do not seriously urge that such notice did not comport with due process standards. Instead, Petitioners attempt to argue that the activities of the utility seeking the increase somehow impaired the notice given. Oklahoma law does not require notice by the utility to the rate-payers. The facts alleged regarding the utility's own description of the form and impact of the increase it was seeking are beside the point. The Commission has the duty of giving notice and did so in compliance with Oklahoma law. The Oklahoma law is fully consistent with the Fourteenth Amendment and this compatibility is not subject to disputes between the ratepayers and the utilities regarding the utility's intentions in seeking an increase in revenues. This Commission cannot be ousted of its proper jurisdiction under Oklahoma law by the activities of the regulated utilities or the ratepayers.

B. The Petition should be denied since Petitioners have effective remedies available before the Oklahoma Corporation Commission.

This case is not appropriate for issuance of a Writ of Certiorari since the Petitioners have other immediate and effective remedies under the Commission's own rules. The Commission has broad regulatory and supervisory control over the public utilities in Oklahoma. 17 O.S. §152 (1971). Petitioners could have gone directly to the Commission to seek relief from what they considered unfair rates. (The Petitioning Cotton Gins who initiated the case below are regulated utilities themselves and know full well the remedies which are available as well as the rate-making procedures generally.) Petitioners chose to seek relief from the Oklahoma Supreme Court and were unsuccessful. Despite that decision, the relief they seek is still available from the Commission, which has continuing jurisdiciton over utility rates. Rule 26(b) of the Commission Rules provides for a new hearing if Petitioners desire:

"RELIEF FROM ORDER:

(b) At any time subsequent to ten days after entry of an order, an application to vacate, alter, amend or change the order, or for any other form of relief from the order, filed by any party, whether or not a party of record in the original proceeding, shall be treated as a separate proceeding, and shall be governed by rules applicable to the commencement of a proceeding."

Petitioners cannot complain that they do not have access to *immediate* relief since Rule 25(b) provides for

Emergency Orders as follows:

> "(b) *Emergency Orders:* After an application has been filed, the Commission may, upon application of any party, with or without notice or hearing, make an emergency order for the protection of parties of their rights, or in the public interest . . ."

It is puzzling why the Petitioners would burden this Court with a Petition for Writ of Certiorari (presumably compelling another rate hearing before the same Commission with different "notice") when under the Commission's own rules the Petitioners could and can this very day apply to vacate, alter, or amend the offending rate order and obtain a full hearing in connection therewith before the Commission.

The Oklahoma Supreme Court has recognized this right to seek relief from an objectionable rate. In *State ex rel. Oklahoma Natural Gas Co. v. Hughes*, 204 Okla. 134, 227 P.2d 666 (1951), the Court enjoined a trial court from hearing an action attacking a Commission rate order and explained the proper remedies available to the plaintiff:

> "This does not mean that parties feeling themselves so aggrieved are without remedy. They might have appealed from the order of July 9th, 1949. *They may at any time apply to the Corporation Commission for relief from any oppressive, discriminatory, or objectionable rate schedule order, and may appeal therefrom to this court.* Thus may be had a complete judicial review in keeping with the constitution, and a comprehensive attack on rate schedules and practices may thus be made." (Emphasis added.) 227 P.2d a 668-69.

The Petitioners have failed to exhaust — or even adequately utilize — their available statutory remedies. Not only does this call into question the Petitioners' objectives, it fully justifies a prompt denial of the Petitioners' application.[2]

C. CONCLUSION

The Petitioners' case on its face is an inappropriate instance for the extraordinary and discretionary Writ of Certiorari. First, Petitioners admitted below that PSO was probably entitled to a rate increase and that the restructured rates were not necessarily inequitable:

> "It is not the position of Plaintiffs that Public Service Company is not entitled to a rate increase as a result of the proceedings hereinabove referred to, nor is it the position of Plaintiffs that a 'restructuring' of tariffs is necessarily inequitable . . ." (Plaintiffs' Brief in Support of Petition for Writ of Prohibition and Injunction, p. 6)

Secondly, Petitioners failed to perfect a timely appeal of the Commission's Order to the Oklahoma Supreme Court. (The Order was entered April 15, 1975 and the Petitioners

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[2] It should be noted that although the Petitioners did not seek to amend the order by seeking a new hearing under Commission Rule 26(b), the Respondent Public Service Company filed on December 6, 1976 a new application for a rate increase pursuant to Rule 10 of the Commission Rules. A hearing was set, notice given pursuant to Corporation Commission Rules, and eight days of hearings were held with the Petitioners participating. The new Commission Order is imminent and when is issued will supercede the previous order and make the entire issue presented herein moot.

took no action at all until October 3, 1975, more than four and one-half months after the new rates went into effect.) Thirdly, the Petitioners sought extraordinary relief from the Oklahoma Supreme Court and after oral argument to the Court and the filing of numerous briefs were denied that relief. Fourthly, the Petitioners have the right (and have had for the past two years or more) to avail themselves of Rule 26(b) for immediate relief from the Order to which they object but have failed to do so. Finally, the entire question has been made moot by a subsequent rate hearing involving Petitioners and Respondents.

This is not a case of merit or importance. Sound judicial discretion does not require the issuance of a Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, JACK SWIDENSKY, a member of the Bar of the Supreme Court of the United States and General Counsel for the Respondent, Oklahoma Corporation Commission, hereby certifies that on the 2nd day of July, 1977, pursuant to the Rules of the Supreme Court, I served three (3) copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the Oklahoma Supreme Court on the following parties:

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APPENDICES

APPENDIX A

OKLAHOMA STATUTES
TITLE 17, SECTION 121
Commission Has Power of Court of Record Regarding Refunds

The Corporation Commission is hereby vested with the power of a court of record to determine: First, the amount of refund due in all cases where any public service corporation, person, or firm, as defined by the Constitution, charges an amount for any service rendered by such public service corporation, person, or firm, in excess of the lawful rate in force at the time such charge was made, or may thereafter be declared to be the legal rate which should have been applied to the service rendered; and, second, to whom the overcharge should be paid.

OKLAHOMA STATUTES
TITLE 17, SECTION 122
Judgment for Overcharge-Lien-Collection

Upon ascertaining the amount of overcharge due from any public service corporation, person or firm, the Corporation Commission shall have authority to render judgment against such public service corporation, person, or firm, for the amount of such overcharge that may have been collected from the public in violation of any legal rate, or order of the commission, if necessary to insure the prompt payment of the same to the commission. Such judgment

shall be a lien upon the property of the public service corporation, person, or firm, and shall be collected in the same manner that fines and penalties imposed by the Corporation Commission are now authorized to be collected by law, and, when collected, shall be paid immediately by the commission to the parties to whom it is due.

OKLAHOMA STATUTES
TITLE 17, SECTION 124
Appeal Regarding Refunds

Any party in interest shall have a right to appeal from any action of the commission to determine the amount of refund due, or to whom such refund shall be made, or from any order or judgment rendered by the commission pertaining to the subject-matter set forth in any of the above sections of this act, in the same manner as appeals are now taken from the Corporation Commission to the Supreme Court.

OKLAHOMA STATUTES
TITLE 17, SECTION 152
Commission's Jurisdiction Over Public Utilities

The Commission shall have general supervision over all public utilities, with power to fix and establish rates and to prescribe rules, requirements and regulations, affecting their services, operation, and the management and conduct of their business; shall inquire into the management of the

business thereof, and the method in which same is conducted. It shall have full visitorial and inquisitorial power to examine such public utilities, and keep informed as to their general conditions, their capitalization, rates, plants, equipments, apparatus, and other property owned, leased, controlled or operated, the value of same, the management, conduct, operation, practices and services; not only with respect to the adequacy, security and accommodation afforded by their service, but also with respect to their compliance with the provisions of this act, and with the Constitution and laws of this state, and with the orders of the Commission.

APPENDIX B

OKLAHOMA CORPORATION COMMISSION
RULES OF PRACTICE — RULE 25(b)

ORDERS:

* * *

(b) *Emergency Order:* After an application has been filed, the Commission may, upon application of any party, with or without notice or hearing, make an emergency order for the protection of parties or their rights, or in the public interest, which order shall state, in addition to applicable provisions of sub-paragraph (a) above, the following:

(1) The emergency or circumstances necessitating the order.

(2) Any notice given or hearing held prior to entry of the order.

(3) That the order is temporary, and subject to final determination of the proceedings.

(4) The time limitations of the order, which shall be the date set for hearing or another day certain. Continuance of the hearing shall not serve to extend an emergency order. Any party affected by an emergency order may file written application for a hearing thereon, stating the precise grounds for objection to the order, which hearing may be held upon such notice to other parties as the Commission shall direct.

OKLAHOMA CORPORATION COMMISSION
RULES OF PRACTICE — RULE 25(c)

ORDERS:

* * *

(c) *Stay of Orders:* The effectiveness of an order or its enforcement will not be stayed or postponed by the filing of any application for rehearing or for other relief therefrom. The Commission may by order stay any order pending further hearing, and may stay or postpone the effective date thereof, or enforcement thereof for such time and on such terms as may be just.

OKLAHOMA CORPORATION COMMISSION
RULES OF PRACTICE — RULE 26(b)

RELIEF FROM ORDERS:

* * *

(b) At any time subsequent to ten days after entry of an order, an application to vacate, alter, amend or change the order, or for any other form of relief from the order, filed by any party, whether or not a party of record in the original proceeding, shall be treated as a separate proceeding, and shall be governed by rules applicable to the commencement of a proceeding. The application shall (1) identify the order sought to be altered or amended, (2) state specifically the parts or provisions sought to be altered or amended, (3) state specifically the amendments or alterations sought, and (4) state specifically the grounds upon which such relief is sought. Notice of hearing of the